

Hon. Robert J. Bryan

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DENISE J. McMAHON,

Plaintiff,

v.

HEWLETT-PACKARD COMPANY,

Defendant.

Civil No. C05-05357-RJB

ORDER GRANTING DEFENDANT'S  
MOTIONS FOR SUMMARY  
JUDGMENT AND DISMISSAL FOR  
FAILURE TO PROSECUTE

**I. MOTIONS**

This matter came before the Court on the motion for summary judgment of defendant Hewlett-Packard Company with regard to the three claims alleged by plaintiff Denise J. McMahon of wrongful termination because of federal grand jury service, disability discrimination contrary to Washington state law, and termination contrary to Washington state public policy. Defendant HP also submitted a separate motion to dismiss plaintiff's claims for failure to respond to discovery requests and to appear for her rescheduled deposition.

**II. FACTS**

Plaintiff Denise J. McMahon worked for Hewlett-Packard Company from November 1978 until her termination in August 2004. She initially worked in Santa Rosa, California, and then transferred to HP's Vancouver, Washington, facility in 1992.

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1 In February 2002 Robyn Walker became plaintiff's manager in the Vancouver  
2 facility. In August 2002 plaintiff received a summons to appear for federal grand jury service in the  
3 Western District of Washington, beginning in September 2002 for a term of 18 months, with jury  
4 service for two days a week in Seattle, Washington, every other week. Defendant HP permitted  
5 plaintiff McMahon to take the necessary time to perform her federal grand jury service for the 18  
6 months. Plaintiff received her regular HP salary during her jury service.

7 Plaintiff's performance evaluation done by Walker in February 2003 was not  
8 satisfactory, although the relationship between plaintiff and Walker remained positive.

9 In November 2003 plaintiff was granted a personal leave of absence to address a  
10 serious family situation. Plaintiff remained on the leave of absence until late January or early  
11 February 2004. During plaintiff's leave, defendant HP discovered that plaintiff improperly used her  
12 HP corporate credit card to charge over \$2600 in personal items. Plaintiff was counseled about this  
13 by Walker and repaid the charges.

14 In February 2004 plaintiff was evaluated again on her job performance and received  
15 her second unsatisfactory evaluation by Walker. Plaintiff was placed on a formal performance  
16 improvement plan beginning March 1, 2004.

17 Plaintiff's federal grand jury service ended in Spring 2004. Thereafter, plaintiff was  
18 off work in May 2004 for less than two weeks due to a medical condition and returned to work on  
19 May 17, 2004, without restriction for her position at HP.

20 Walker concluded in August 2004 that plaintiff did not meet the terms of her  
21 probation plan and recommended her termination. HP concurred in the recommendation and  
22 plaintiff was terminated on August 16, 2004, for continued poor performance and failure to meet the  
23 terms and conditions of her probation and performance improvement plan.

24 After filing her lawsuit, during a deposition plaintiff stated that her opinion as to why  
25 Walker's attitude toward her may have changed was that Walker felt that plaintiff was supporting  
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1 her husband in a serious personal family matter when she should have been supporting her children  
2 in that situation. Plaintiff neither opined nor produced any evidence of other reasons for her  
3 termination by defendant HP.

### 4 **III. FAILURE OF DISCOVERY**

5 The present action was filed in this Court on June 2, 2005. The Court's pretrial  
6 scheduling order of September 28, 2005, required all discovery to be completed by January 17, 2006.  
7 Plaintiff's deposition was partially taken by defense counsel on November 8, 2005. After this  
8 deposition plaintiff's counsel filed a motion to withdraw, which was granted by this Court in its  
9 Order of December 6, 2005.

10 After her counsel had withdrawn and she was proceeding *pro se*, defendant sent  
11 plaintiff on December 9, 2005, a deposition notice for her continued deposition, set for January 13,  
12 2006, and also sent her requests for the production of documents and interrogatories. Plaintiff did  
13 not appear for her scheduled deposition on January 13, 2006, without explanation, nor did she  
14 respond in any way to defendant's interrogatories and requests for production of documents.  
15 Defendant advised plaintiff by letter dated January 17, 2006, that it would be moving to dismiss her  
16 claims for not responding to discovery, and gave her until January 27, 2006, to advise defendant as  
17 to her position on discovery. Plaintiff did not respond prior to the filing of defendant's motion on  
18 February 8, 2006.

### 19 **IV. MOTION FOR SUMMARY JUDGMENT**

20 A. **Summary Judgment.** Fed. R. Civ. P. 56 authorizes a party against whom a  
21 claim is asserted to move for summary judgment as to all such claims. The purpose is to avoid  
22 unnecessary trials when there is no dispute as to the material facts before the Court. Zweig v. Hearst  
23 Corp., 521 F.2d 1129 (9<sup>th</sup> Cir.), *cert. denied*, 423 U.S. 1025 (1975). Where the defendant advances  
24 evidence confirming the lack of any material facts in dispute, the plaintiff must establish specific  
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1 facts demonstrating existence of each element essential to the plaintiff's case in order to create a  
2 genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

3 In the present case plaintiff has failed to advance evidence demonstrating any issue of  
4 material fact as to each of her claims. Therefore, based on the analysis set forth below, each of those  
5 claims shall be dismissed with prejudice.

6 **B. Federal Grand Jury Service.** Federal law prohibits discharge of an employee  
7 by an employer for serving on a federal grand jury. 28 U.S.C. § 1875. But this statute does not  
8 guarantee employment regardless of employee conduct during the term of the jury service. Rogers  
9 v. Comprehensive Rehabilitation Associates, 808 F. Supp. 493, 499 (D. S.C. 1992). There is no  
10 evidence that any improper action was taken against plaintiff because of her federal grand jury  
11 service. Plaintiff attended all sessions of the grand jury proceedings, and defendant continued to pay  
12 her regular salary. Defendant has advanced a non-discriminatory reason for plaintiff's termination,  
13 poor job performance, and plaintiff has produced no evidence suggesting this reason is a pretext.  
14 Accordingly, defendant is entitled to summary judgment on plaintiff's claim of discrimination  
15 because of grand jury service.

16 **C. State Disability Discrimination Claim.** Plaintiff claims a violation of  
17 Washington state law, RCW 49.60.180, because of alleged discrimination based on disability.  
18 Plaintiff has advanced no evidence to suggest what her alleged disability is, or the action by  
19 defendant in response thereto which is improper.

20 Under Washington state law, there are two types of disability claims: failure to  
21 reasonably accommodate, as established by medical necessity, and disparate treatment because of an  
22 employee's condition. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145-48, 94 P.3d 930 (2004). Even  
23 assuming that plaintiff had a temporary disability in November 2003 or May 2004 which had a  
24 substantially limiting effect on her ability to perform her job, Pulcino v. Federal Express, 141 Wn.2d  
25 629, 640-44, 9 P.3d 787 (2000), defendant has submitted evidence showing that during those  
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1 temporary disabilities plaintiff was reasonably accommodated by leaves of absence and that she  
2 returned to work without any limitation. Accordingly, defendant is entitled to summary judgment on  
3 the claim of disability discrimination for failure to accommodate.

4 On the second potential disability claim of discrimination based on disparate  
5 treatment, plaintiff has advanced neither any medical evidence of a disability nor discrimination  
6 against her because of a disability. Defendant, however, has produced evidence of a  
7 nondiscriminatory reason, poor job performance, for plaintiff's termination, and plaintiff has failed  
8 to meet her burden of presenting any evidence that the nondiscriminatory reason is pretextual.  
9 Pulcino, 141 Wn.2d at 639. Accordingly, defendant is entitled to summary judgment on plaintiff's  
10 claim of disability discrimination.

11 D. **Public Policy.** Plaintiff's complaint fails to make clear the alleged  
12 Washington state public policy that she claims was violated by her termination. Under Washington  
13 state law, courts should proceed cautiously in declaring a public policy or breach thereof. Blinka v.  
14 Wash. State Bar Ass'n, 109 Wn. App. 575, 586, 36 P.3d 1094 (2001). To set forth a claim for  
15 breach of state public policy four elements must be established: the existence of a clear state public  
16 policy; that the policy would be jeopardized if the claim is not separately recognized because there is  
17 no other means to protect the policy; that the state public policy-linked conduct caused plaintiff's  
18 termination; and that the defendant is unable to offer over any justification for the termination.  
19 Gardner v. Loomis Armored, 128 Wn.2d 931, 941, 913 P.2d 377 (1996); Sedlacek v. Hillis, 145  
20 Wn.2d 379, 393, 36 P.3d 1014 (2001).

21 Plaintiff has failed to establish the existence of a clear Washington state public policy  
22 breached by her termination. Defendant, however, has produced evidence that plaintiff was lawfully  
23 terminated for poor job performance. Accordingly, defendant is entitled to summary judgment on  
24 plaintiff's claim of wrongful termination in breach of public policy.

1                                   **V. FAILURE TO RESPOND TO DISCOVERY**

2                   Even if the Court had not concluded that defendant's motion for summary judgment  
3 should be granted, as described above, the Court would dismiss plaintiff's complaint for failure to  
4 prosecute and respond to discovery.

5                   The fact that a plaintiff is proceeding *pro se* does not diminish her responsibilities and  
6 obligations under the Federal Rules of Civil Procedure. Plaintiff has failed to proceed with the  
7 prosecution of her claim or to respond to discovery, including the continuation of her deposition,  
8 before the discovery cutoff date of January 17, 2006. Fed. R. Civ. P. 41(b) authorizes dismissal for  
9 failure to comply with the federal rules or to prosecute an action. Martin v. Metropolitan Museum of  
10 Art, 158 F.R.D. 289, 292-93 (S.D.N.Y. 1994). In addition, Fed. R. Civ. P. 37(d) provides for the  
11 sanction of dismissal when the plaintiff abandons the prosecution of her action. Carter v. Prince  
12 George's County, 155 F.R.D. 128, 130 (D. Md. 1994).

13                  Plaintiff's deposition was continued from November 8, 2005, and timely re-noted on  
14 December 9, 2005, for January 13, 2006, which gave plaintiff over a month to prepare and to make  
15 herself available. Even though plaintiff was proceeding *pro se*, her failure to appear for her  
16 deposition is a basis for dismissal with prejudice. Bobal v. Rensselaer Polytechnic Institute, 916  
17 F.2d 759, 764 (2d Cir. 1990), *cert. denied*, 499 U.S. 943 (1991). The sanction of dismissal also is  
18 appropriate where plaintiff fails to answer written discovery, as plaintiff McMahon has done in this  
19 case. Robison v. Transamerica Ins. Co., 368 F.2d 37, 39 (10<sup>th</sup> Cir. 1966).

20                  Plaintiff failed to attend her re-noted deposition, failed to answer written discovery,  
21 and she failed to respond to attempts at further communication from defendant regarding this  
22 discovery, which was to be completed by January 17, 2006. This failure to communicate was the  
23 reason given by plaintiff's former counsel in submitting their motion to withdraw, which this Court  
24 granted on December 6, 2005. The Court concludes that plaintiff abandoned her action by her  
25 failure to prosecute and respond to discovery, which has caused prejudice to defendant in its ability  
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1 to prepare for and defend the claims alleged against it by plaintiff. For these reasons, even if the  
2 Court had not concluded that defendant's motion for summary judgment on all claims should be  
3 granted, independently, all of plaintiff's claims should be dismissed with prejudice because of her  
4 failure to prosecute and to respond to discovery in a timely fashion.

5 **VI. ORDER**

6 Based on the above, the Court hereby grants the motion for summary judgment by  
7 defendant Hewlett-Packard and dismisses plaintiff Denise J. McMahon's claims for (1) wrongful  
8 termination because of plaintiff's federal grand jury service; (2) disability discrimination contrary to  
9 Washington state law, RCW 49.60.180; and (3) wrongful termination contrary to Washington state  
10 public policy.

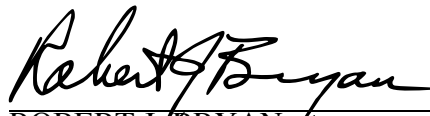
11 Independent of the granting of defendant's summary judgment motion, the Court in  
12 the exercise of its discretion dismisses with prejudice plaintiff's claims for failure to prosecute and  
13 failure to respond to defendant's discovery requests.

14 Defendant Hewlett-Packard Company is awarded its statutory costs and fees.

15 **IT IS SO ORDERED, and this case is DISMISSED.**

16 The Clerk of the Court is directed to send uncertified copies of this decision to the  
17 parties and counsel of record.

18 DATED this 22<sup>nd</sup> day of March, 2006.

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21   
22 ROBERT J. BRYAN  
23 United States District Judge  
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